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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

OCTOBER 7, 2021

4:01 P.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; October 7, 2021.)

THE COURT: Counsel, a number of reporters called the office indicating their desire to listen in. And as I -- this is a -- I have not rendered this a confidential conference in some way or made it sealed. I'm going to proceed with the reporters online.

And if we have to do this in the future if I get -- and I know that there is that much interest, I would simply have it in the courtroom. But for now that is where we're at.

We're here for -- Counsel, do you believe that all the people who are associated with you are on the line? We keep on hearing more beeps. So I don't know who else that is. But it is all right as long as it is not -- you're not missing somebody.

MR. CROSS: This is David Cross, Your Honor. We have everyone for the Curling plaintiffs.

MR. BROWN: This is Bruce Brown, Your Honor. We have everybody for the Coalition plaintiffs.

MR. RUSSO: This is Vincent Russo.

THE COURT: You feel like you have everyone, Mr. Russo?

MR. RUSSO: (Unintelligible).

THE COURT: All right. Mr. Russo, we hardly can hear you. Are you driving?

1 MR. RUSSO: I am not, but I do hear background noise.
2 I don't know that it is necessarily our phone. But I can move
3 closer to the phone if that would be helpful to Your Honor.

4 THE COURT: All right. So you are not in a car? I'm
5 just trying to --

6 MR. RUSSO: No, ma'am. I'm in an office in the
7 conference room.

8 THE COURT: Well, if anyone else is driving --
9 Mr. Belinfante, are you driving?

10 MR. BELINFANTE: Your Honor, I'm in a car. But I
11 have my phone on mute.

12 THE COURT: Well, I don't know what is going on. It
13 is just --

14 COURTROOM DEPUTY CLERK: Everyone that is on the call
15 make sure that your phone is muted, please. Make sure your
16 phone is muted.

17 THE COURT: Oh, my gosh. This feels like
18 magnificent. It is such an improvement.

19 All right. We're here for a discovery conference in
20 Curling vs. Raffensperger, Civil Action Number 1:17-CV-2989.
21 And the parties have multiple disputes regarding the Curling
22 plaintiffs' second set of interrogatories.

23 And let me just say here these are somewhat, like I
24 said -- as I said in a written order regarding the defendants'
25 lengthy request for interrogatories and other materials that it

1 would be simpler, it seemed to me, on most of these matters for
2 the parties to take depositions rather than to engage in this
3 jousting around interrogatories, given the scope of the issues
4 and the nature of the issues.

5 And have you sat down and talked about already what
6 depositions will be taken?

7 MR. CROSS: Your Honor, this is David Cross. The
8 depositions of our clients are scheduled.

9 THE COURT: All right. Now I'm talking about --
10 since you are the ones who are at this juncture seeking more
11 information through the second set of interrogatories, have you
12 sat down and talked with the defendants alternatively about
13 taking depositions that would provide at least some of this --
14 some information that would be responsive to these
15 interrogatories?

16 MR. CROSS: Only with respect to a 30(b)(6), Your
17 Honor. We've had extensive negotiations about that. We were
18 waiting for the document production to be completed, which I
19 understand from the last report we saw from the State should be
20 completed sometime in the next week or two, I think. And then
21 we wanted to get scheduled the 30(b)(6) deposition and then, of
22 course, some of the individual employees as well. But we
23 wanted to make sure we had a complete set of folks that we
24 would want to depose based on what we see in the documents.

25 The interrogatories were intended to help us focus on

1 who we would want to depose as well. But I understand Your
2 Honor's point that maybe the depositions can be, I guess,
3 another avenue to get that information.

4 THE COURT: Well, what I'm concerned about is they
5 are broad. And then to answer them would be -- many of the
6 questions would involve detailed answers, and that would
7 involve an enormous amount of work, and likely you would still
8 not get what you are actually anticipating you would want to
9 receive.

10 So I'm not -- and then you would all be back in front
11 of me again, which you may be anyway. But it just seems like
12 that inevitably is going to end up in a lot of disputes and
13 still also a lot of frustration on all parties' part about
14 whether you've gotten an actual responsive and sufficiently
15 complete answer. And --

16 MR. CROSS: Your Honor, this is David -- I'm sorry.

17 THE COURT: Yes. Go ahead.

18 MR. CROSS: I just was going to say I appreciate the
19 concern about the breadth. We had hoped to negotiate down a
20 scope on this. But the position we got from the State was they
21 have given us all they are going to give us.

22 And so just to take a concrete example, if you take
23 just the first interrogatory at issue, Number 15, all we're
24 really trying to find out, you know, is the State aware --
25 State defendants aware of any actual or suspected hack or

1 compromise of the election system.

2 And we don't have an answer at all, which is why I
3 say the breadth is not so much the challenge. If we had a
4 substantive answer to that, it may be sufficient. We don't
5 have a substantive answer at all other than pointing to things
6 that are publicly available.

7 And to give you the concrete example, you know, we
8 understand that Fortalice, for example, which Your Honor will
9 recall is their outside cybersecurity consultant, was engaged
10 on at least a couple of occasions, once in 2019 and once last
11 year in 2020, involving what we understand were at least
12 suspected and possibly actual compromises of components of the
13 election system.

14 We are on a public call. So I'm not going to get
15 into specifics about that. We would be able to do that. But
16 that doesn't appear in their responses. We know about that
17 only because of discovery from Fortalice.

18 And it is curious that we have not seen that in their
19 documents, including documents from Fortalice that are
20 exchanged with the State. And it is not in their responses.

21 And so I just want to be clear it is not a situation
22 where we -- where we got substantive responses and we said it
23 is not enough. They literally just declined to answer these
24 interrogatories at all, other than citing what they call
25 non-exhaustive examples of documents. And that is not what

1 Rule 33(d) allows.

2 In taking Interrogatory 15, they don't even answer
3 whether there has ever been any compromise of the system at
4 all. And we raised that specifically in the negotiations.
5 Could we just get an up or down yes or no to that?

6 The fact that they won't answer, I think, probably
7 tells us the answer. But we need an answer of some measure,
8 other than just saying here are a handful of documents that
9 you've got from public sources.

10 That would be our position.

11 MR. RUSSO: Your Honor, this is Vincent Russo. You
12 know, regarding this interrogatory and all of them, Your Honor
13 is correct that they are extremely broad. And if you couple
14 the interrogatory requests with the definitions that the
15 plaintiffs have used in their interrogatories, the requests
16 expand exponentially to the point that, Your Honor, I don't
17 think anyone could provide a complete answer.

18 Now, it sounds like Mr. Cross is referencing
19 documents that answer those questions. If there are others --
20 we have produced thousands and thousands of documents. We have
21 been going through this exercise for months. And we are
22 hopefully at the tail end of it.

23 They have received, of course, Fortalice documents
24 from the State in the past related to Fortalice's work. And,
25 Your Honor, I would suggest if you look at the definitions -- I

1 know that they weren't provided because the plaintiffs didn't
2 attach their actual requests to this joint discovery statement.
3 But they are extremely broad. And, you know, to be able to
4 describe with specificity a suspected security vulnerability at
5 that time as defined, I don't think anybody could reasonably
6 provide a response to that.

7 THE COURT: Well, I don't have the definitions in
8 front of me, unless one of you filed it. I see the objections
9 to them. But I don't see the -- I don't have a definitions
10 section here.

11 MR. RUSSO: Mr. Miller will send those to Mr. Martin.

12 THE COURT: Okay.

13 Well, let me -- just as to Number 15, did you-all
14 attempt to meet and confer regarding how to narrow what was
15 being sought in 15 if that is -- because obviously this is a
16 more concrete one in my -- actually, even though I know that
17 the State views it as particularly broad. But I think it is
18 certainly susceptible to being narrowed.

19 MR. CROSS: Yes, Your Honor. David Cross.

20 We talked about that one specifically. You know,
21 when we received the objections, we invited them to give us a
22 proposed narrowing of each of the requests. The reaction we
23 got was no, that they would not do that. So that is how we are
24 where we are.

25 You know, Mr. Russo's argument, I appreciate again

1 the breadth. But that would be a defense of an answer related
2 to an interrogatory to say, well, we did our best. We gave you
3 a good faith response where we conducted due diligence,
4 compiled an answer, and here it is. And now they are asking
5 for more.

6 That is not where we are. We don't have any answers
7 to these interrogatories at all. And we have not been able to
8 get an engagement on narrowing it down to something that they
9 would find agreeable.

10 MR. RUSSO: Your Honor, we had a meet-and-confer with
11 Mr. Sparks. I don't believe Mr. Cross was on that call. And
12 if I recall, the narrowing of the request was simply to remove
13 the reference to the voter registration system as being part of
14 the current election system that is referenced in the request.

15 So, in other words, it was so broad previously that
16 it would have encompassed the voter registration system. And
17 it was narrowed to remove that, and that was it.

18 THE COURT: And what was plaintiffs' view as to why
19 you didn't want yourselves to propose a narrowing, having seen
20 the objections and having had that conversation?

21 MR. CROSS: Your Honor, this is David Cross. I think
22 the challenge we had, as we tried to explain in each of our
23 discovery disputes, is I'm not sure how we narrow it. I mean,
24 the question for the State is what would you consider a
25 reasonable scope within the scope of the request.

1 And that is how I have litigated my entire career.
2 If somebody sends me a discovery request that I think is
3 overbroad, I'm going to come back to them and say here is what
4 I think is reasonable, this is what we're willing to answer.
5 And then you negotiate from there.

6 I'm just shooting in the dark, as Mr. Russo just
7 pointed out. Right? One of the ways to narrow, as Mr. Sparks
8 suggested, was, well, what if we pull out the registration
9 database. And that was not a sufficient narrowing.

10 And it is just not a useful -- it is not a good use
11 of time for us just to offer one proposal after another in the
12 dark.

13 What really should happen is they come back and say,
14 we read your request, we think it is too broad, but here is the
15 scope that we're willing to answer.

16 And we have never gotten that. We have invited it
17 many times. So we just find ourselves at impasse.

18 MR. RUSSO: Your Honor, I think this somewhat goes
19 back to the issue of taking depositions and that they could
20 simply take a 30(b)(6) and have -- and question a witness over
21 this topic.

22 Now, alternatively, of course, the plaintiffs could
23 have narrowed it -- narrowed the request to say describe each
24 breach of the system or describe a hack of the system. We
25 haven't seen any evidence so far in this case that demonstrates

1 that the system has been -- that the BMD system has been
2 hacked, so to speak, or changed anybody's votes.

3 But there are ways to narrow it without -- that they
4 could have done if they really wanted to have a precise
5 interrogatory that the State could have answered. But to leave
6 it as each known or attempted or suspected security
7 vulnerability or security breach is literally impossible for
8 anyone to answer.

9 THE COURT: Well, Interrogatory 19 says identify any
10 efforts made to ensure that any actual or potential hack or
11 compromise of Georgia's GEMS DRE election system could not and
12 did not affect the current election system. Well, that is sort
13 of dealing with a hack. And the same sort of general
14 objection.

15 And I think there was another one that dealt with
16 asking about specific -- other than the Number 15 where we
17 started.

18 MR. RUSSO: Your Honor, this is Vince Russo. I'll
19 try to address that Number 19 real quickly. The request is
20 asking the State to go back many years, not just, you know, to
21 the start of when the BMD system was put in place is one issue.

22 However, they have also received Fortalice reports,
23 reports -- Pro V&V reports, documents regarding hash values,
24 and other documents. So they have documents that would provide
25 the information they are looking for.

1 I'm not sure if they just don't want to go look for
2 it or they just want us to lay everything out for them. But
3 the way this request is still framed is extremely broad.

4 MR. CROSS: Your Honor, this is David Cross. The
5 challenge that we have -- what Mr. Russo keeps pointing out is
6 we have documents from third parties. That is not really the
7 way this is supposed to work. I mean, we're not supposed to be
8 finding out that there has been a compromise of the election
9 system only because Fortalice produced something to us
10 indicating that.

11 The purpose of document requests to the State as a
12 party or to the State defendants as a party and the
13 interrogatories is to gather that information. And we have
14 never heard an explanation for why we received these documents
15 only from third parties when they include emails with folks at
16 the State.

17 We've had the same issue with documents coming in
18 from Dominion. And they just refuse to answer interrogatories.

19 And, again, you know, we can discuss the breadth.
20 But that doesn't justify no answer at all.

21 And so we're just -- I'm concerned about the idea
22 about going into depositions because an individual witness is
23 only required to know what they know. And there is no
24 obligation to prepare them.

25 And so an individual witness could easily come in and

1 say, I don't know anything about what you are asking me about.
2 They may not know about a compromise.

3 The 30(b)(6) has been an extraordinary fight. We
4 have been trying to negotiate that for months. And so for
5 Mr. Russo to now say, well, we should just take a deposition on
6 this topic, well, we served the topic and we have narrowed it
7 multiple times and we haven't gotten anywhere.

8 So we just -- we keep finding ourselves running into
9 a wall in discovery from the State defendants. And then their
10 answer is, well, don't worry, third parties are giving you a
11 smattering of documents that we should be getting from the
12 State. And that is just not the way this process is supposed
13 to work.

14 And the end result is going to be are we really
15 learning what we need to learn. And, again, it comes back to
16 why won't they just answer the question of has there been a
17 compromise to the system.

18 MR. RUSSO: Your Honor, I don't necessarily think
19 that is entirely accurate. The State has produced those
20 documents to them. Fortalice documents -- the State has
21 produced Fortalice documents. The State has produced documents
22 regarding hash values. The State has produced several thousand
23 documents in this case.

24 And regarding the 30(b)(6), it has been -- if I
25 recall, it has been about two months or so since any discussion

1 about the 30(b)(6) has come up. So, you know, to say that
2 we're conducting extensive negotiations, I don't think, you
3 know -- I didn't see anything. And if I have been left off of
4 those emails, I apologize. But I don't recall seeing anything
5 for a time.

6 THE COURT: So your document --

7 MR. CROSS: Your Honor?

8 THE COURT: Yes. Go ahead.

9 MR. CROSS: I was just going to say just briefly on
10 the issue of the third-party documents, Mr. Russo is right.
11 There are some documents from them that include things like
12 Fortalice and Dominion.

13 What is troubling is it doesn't include really key
14 documents. Right? For example, we learned only from Fortalice
15 that it was engaged in 2019 and 2020 for specific concerns
16 involving the system.

17 And those documents indicate that there were also
18 going to be monthly reports as a part of those engagements. We
19 have not seen those from the State. And we don't have an
20 explanation on that.

21 And, you know, again, fundamentally, I would invite
22 Mr. Russo to answer the question now. Has there been any
23 compromise to the system, and have they investigated that in
24 response to any of our discovery requests? We just have not
25 gotten an answer even at that threshold level.

1 MR. RUSSO: And, Your Honor, I would say this is the
2 first time that this issue regarding a Fortalice document has
3 been raised. It was not raised during the meet-and-confer. It
4 hasn't been raised since. I'm not entirely sure what document
5 he is referring to.

6 And it may be that we have produced other materials
7 that are -- that Mr. Cross is referencing. I don't know if
8 they have looked. But that is something that I would have to
9 look into here. But this is a new issue that has been raised
10 now, which, you know, should have been raised pretty easily.

11 THE COURT: So how many more documents do you have to
12 produce? What is the estimate, Mr. Russo?

13 MR. RUSSO: I'm going to turn that over to
14 Mr. Miller. He is our eDiscovery expert over here.

15 MR. MILLER: I'm unclear about the expert title, Your
16 Honor.

17 But with respect to our progress, we anticipate
18 making a production tomorrow. That will in large part almost
19 completely finish our document production of the 100,000 or so
20 documents that we discussed at length.

21 After that, it will simply be just some quality
22 control maybe for a week at most just ensuring that we have
23 gotten everything out the door.

24 THE COURT: So, Mr. Cross, have you-all digested what
25 has been provided to you on a rolling basis?

1 MR. CROSS: We have, Your Honor. We have been
2 keeping up with their production.

3 THE COURT: And I mean, I can't necessarily at this
4 point really make heads or tails of what you -- the differences
5 in what is being said, for instance, about the Fortalice
6 documents.

7 But wouldn't part of your remedy here be, in fact,
8 just ensuring that you have received all the documents that you
9 believe exist in connection with the search terms?

10 MR. CROSS: Yes. I was thinking about that. I think
11 that is right. I guess what I'm -- I guess on a 53, Your
12 Honor, is how we would ever confirm that. We have assumed as
13 these productions roll in that we're getting all the documents
14 that are captured by the search terms and responsive.

15 But, again, then we get documents from third parties
16 that should also be coming in, and we don't understand why
17 we're not getting those.

18 And so -- and I will say in fairness to Mr. Russo I
19 had not raised with him the specific Fortalice documents.
20 Those only -- I think we only got them recently. I only
21 learned about them myself recently.

22 But we have raised on a number of occasions things
23 including in filings that we've gotten documents from third
24 parties, in particular Dominion, that we have not gotten from
25 the State. And we have requested explanations for that, and we

1 have never received it. The Fortalice documents are new.

2 So I guess I'm not sure I answered your question only
3 because I want to assume we're getting everything. But the
4 third-party productions indicate that we're not. And I
5 don't -- I just don't know why that is.

6 THE COURT: Well, wouldn't it --

7 MR. MILLER: Your Honor --

8 THE COURT: I'm sorry. Who is speaking now?

9 MR. MILLER: I apologize, Your Honor. This is Carey
10 Miller.

11 THE COURT: All right.

12 MR. MILLER: I just want to briefly point out, you
13 know, I think actually the first -- perhaps I missed something.
14 But the first thing I noticed about it was in the footnote that
15 again this joint discovery statement regarding documents that
16 they are getting from third parties, you know.

17 At this juncture, the State has expended an enormous
18 amount of resources to produce discovery, which is sufficient
19 and which we maintain is beyond the scope of this case. But
20 I've gotten through it and have produced what we have.

21 And to the extent they have obtained documents from a
22 third party that weren't captured by the search terms, you
23 know, I'm failing to see the prejudice at issue here. That if
24 there is a speculation that documents exist that have not been
25 produced, you know, we are certainly happy to investigate that

1 and make sure everything has been captured.

2 But, Your Honor, I would just point out briefly -- I
3 don't want to get into (unintelligible) here. But this kind of
4 goes back to this speculation of additional documents existing,
5 which frankly was the same boat we were in and that Mr. Cross,
6 you know, strenuously objected to document production on that
7 basis.

8 THE COURT: Okay. Well, I just think this is not
9 going to be a proposition in terms of the interrogatories that
10 I'm going to be able to very easily manage. And given still
11 the scope of the interrogatories, it seems to me that if there
12 is something very specific that the plaintiffs want that is --
13 that can be -- in terms of information that is narrower, then
14 you should propose it. And you should propose it as an
15 alternative.

16 And then I'm happy also to look at that. You can
17 give it to the defendants, and we'll see whether we still have
18 objections.

19 And I'm not saying to go through all of these. I
20 mean, I'm really -- very much as in the other discovery dispute
21 I most recently handled, I would like you to really zone in on
22 what you need. And then if you think that you only have --
23 that you have gotten the documents in part from the State, in
24 part from a third party, and there is something missing that
25 is, in fact, in the State's possession that is going to help

1 you sort something out, then you need to identify that.

2 And they have to go back and look at the documents,
3 and that will be more productive than our basically having them
4 identify -- respond in a way that you find unsatisfactory to
5 the interrogatory.

6 Because inevitably so much of what -- it is not that
7 everything you have proposed here to ask is broad. But because
8 of the -- it is sufficiently voluminous and at the same time
9 specific that I'm just not sure that it is going to -- you are
10 going to get what you want. And we'll just be in this
11 conversation again.

12 But if there is something absolutely narrowly
13 tailored, then you are set up to be able to at least present
14 that to the Court. And the defendants are going to have to be
15 very careful about just asserting a generalized objection at
16 that point.

17 So I guess I have two ways of looking at this. One
18 is, again, you can do this a narrower -- narrowing of this and
19 get very specific as to what you are looking for and the time
20 frame. And, secondly, that if you are -- when you are looking
21 over the documents that you can see clearly that something is
22 materially -- that is material to you is missing, then I
23 suggest that at that juncture you go back to the defendants and
24 they have -- so that they can produce the remaining documents
25 that are associated with what you -- what you believe exists

1 based on what has been delivered to you.

2 And then finally, which is the third thing, is: I do
3 think a 30(b)(6) with follow-up individual depositions or the
4 opposite -- you know, you may want to do a few employees and
5 then -- and then go to the 30(b)(6) deposition based on that.

6 Yes, the employees can't bind the State. But on the
7 other hand, if you do those first, you'll have more information
8 for the 30(b)(6).

9 But you know all of that. And I understand
10 everyone's frustration with each other. But I don't know that
11 I -- if I require the State to respond to these exactly, I fear
12 that there is a lot of work and you-all are just going to be
13 back here and writing more discovery memoranda.

14 So I'm not inclined to do that. But I do want to
15 make clear also to the State that if -- if there is a narrower
16 set of interrogatories as an alternative, I expect you to look
17 at them and to act in good faith in discussing them and what
18 you think you can produce. And if there is a discussion about
19 what -- what is encompassed in a term that you actually discuss
20 what that is, rather than just sending off a generic objection.

21 But I'm not looking for a huge volume of
22 interrogatories in that connection. I think -- because I
23 think, in fact, anything you are going to get ultimately is
24 going to be coming from documents. But there are some that I
25 can understand that you would like to ask. But I think you

1 need to just make it a little more concrete.

2 And also now that you have the objections that go --
3 basically construe anything as a potential statewide phenomena,
4 county data, et cetera -- and if that is what you meant to
5 include, that is one thing. But if you didn't mean to include
6 that, then let's get it narrowed so it is very clear what you
7 are asking for.

8 And then go through the process I discussed on the
9 documents so that you really are sitting down and talking about
10 what is missing based on what you've looked at and having a
11 real conversation about that.

12 MR. CROSS: Understood, Your Honor. We'll do that.
13 This is David Cross.

14 THE COURT: I know that there also was something
15 about -- in the -- in connection with the request as to
16 Dr. Halderman.

17 MR. CROSS: Yes, Your Honor, regarding CISA.

18 THE COURT: Yeah. If CISA itself were to make the
19 request, I would consider it. I think I need to -- I know
20 you've attached some correspondence. But I would like to -- I
21 think it is a different thing -- there is a distinction between
22 the plaintiffs deciding they want to give this to CISA, and it
23 may not be a distinction that makes a difference. But if CISA
24 itself is assuming responsibility for asking for it and
25 representing, of course, that they are going to be implementing

1 whatever their normal security protocols are and directly to
2 the Court, that makes a difference.

3 MR. CROSS: Your Honor, this is David Cross. I just
4 want to make sure I understand.

5 I guess we thought the email from Geoffrey Hale from
6 August 19 that is attached to Dr. Halderman's declaration did
7 that. He indicates that CISA is looking to receive the report
8 and explains that it could go through the coordinated
9 vulnerability disclosure process. And there is information on
10 why and that Dr. Halderman has described on how that process
11 works.

12 So they have indicated that they are prepared to have
13 it and that they want to work with Dr. Halderman in their
14 normal process to address the vulnerabilities or address the
15 report.

16 THE COURT: I understand the letter. I think you
17 probably actually understood what I was saying. I mean, there
18 is -- I understand they are interested. But they are
19 interested via Dr. Halderman reaching out to them.

20 And he is obviously in that community of security
21 data system experts as they are and particularly in the field
22 of elections. But -- and I understood --

23 MR. CROSS: Your Honor, I apologize. I --

24 THE COURT: Go ahead.

25 MR. CROSS: I just -- and I apologize. You just said

1 you want a formal request?

2 THE COURT: I would like to see a formal request,
3 yes.

4 MR. CROSS: Okay. Okay. I see. Understood.

5 THE COURT: And, you know, the formal request would
6 also assure the Court that any materials that might have been
7 provided to Dr. Halderman on a confidential basis through
8 this -- would be that -- of course, that those same protocols
9 would be observed.

10 I mean, I assume --

11 MR. CROSS: Understood, Your Honor.

12 THE COURT: -- that the agency has authority to work
13 with the State and to also reach out to the State.

14 So -- all right. So just to confirm though, the
15 document discovery or the document production from the State
16 will be wrapped up by next -- the end of next week; is that
17 correct?

18 MR. MILLER: Yes, Your Honor. Our -- we intend to
19 make the -- what we think is a final production tomorrow. But
20 we will do some just additional QC but not pulling kind of
21 additional new stuff.

22 THE COURT: All right.

23 MR. MILLER: I think we'll need a week or two at most
24 just to do that quality control.

25 THE COURT: Okay. I'm going to go offline for one

1 second. I just want to check something, and then I will be
2 right back with you.

3 **(A brief break was taken at 4:39 P.M.)**

4 THE COURT: Okay. All right. And I will deal
5 with -- you know, deal with the severance motion that the
6 plaintiffs filed when I get obviously all of your briefs. I'm
7 not going to address that today.

8 Is there anything else that needs to be addressed at
9 this time?

10 MR. CROSS: Your Honor, this is David Cross. Just a
11 view discrete issues while we have you.

12 THE COURT: All right.

13 MR. CROSS: One is: We -- during the depositions
14 that have been taken of some of the Coalition plaintiffs, the
15 State has used reports that I think are from the eNet system,
16 if I understand right. They are reports that show voting
17 history.

18 We have asked for copies of those for our clients.
19 And we have not gotten confirmation that we're going to get
20 those. We would just like to get confirmation that we will get
21 those this week.

22 MR. RUSSO: Your Honor -- sorry.

23 THE COURT: Just tell me who is speaking.

24 MR. RUSSO: Vincent Russo.

25 There are a few things here. First, obviously the

1 State typically doesn't -- we don't typically pull those
2 reports until we have them right in front of us for the
3 deposition. And they haven't been requested previously in a
4 document request. We have gotten I believe over 50 or over 60
5 document requests in this case at least from one side. And we
6 have not had that request.

7 So we are getting informal requests via email. And,
8 you know, we don't -- we have concerns about having this
9 case -- our discovery being conducted informally over emails.
10 We see what is happening (unintelligible) with this case when
11 we conduct business informally.

12 So with that being said, of course, you know, the
13 reports are public records. Any of these individual plaintiffs
14 could submit an Open Records request to get them, if they
15 wanted them, and (unintelligible) --

16 THE COURT: And what?

17 Well, how many people have you not -- do you have
18 left to depose of the plaintiffs?

19 MR. RUSSO: We have three plaintiffs left.

20 THE COURT: All right. Just do me a favor and go
21 ahead and produce their voting history reports and do so --
22 provide them electronically to the plaintiffs by -- by Tuesday.

23 When is the next deposition?

24 MR. RUSSO: I believe the 19th is the next
25 deposition. 19th of October.

1 THE COURT: All right. So if you would provide that
2 by Tuesday, that should be sufficient. It is just the voting
3 reports for three people. Let's not go around the -- beat
4 around the bush in that way.

5 Okay. What else?

6 MR. CROSS: Your Honor, the other thing or the second
7 thing was we learned -- I learned today -- this is David Cross.

8 I learned today from Dr. Halderman that the State has
9 sent a FOIA request to the University of Michigan requesting
10 documents and materials related to his work that relates to his
11 work in this case on the Dominion system.

12 We were surprised by that because there are
13 particular rules on what is discoverable. And so we wanted to
14 raise with the Court our concern that, one, this wasn't flagged
15 for us and, two, they have served document requests asking for
16 the same sort of thing, materials and analyses that he did not
17 rely on in this case and we have objected to that. And this
18 looks to be an end run around that where the University would
19 be expected to produce that and we can't control what the
20 University produces.

21 So we need to make sure that everybody is complying
22 with the discovery rules and what is actually discoverable for
23 testifying experts. And it would only be information and tests
24 and analyses that he is relying on and not going beyond that.

25 MR. MILLER: Your Honor, this is Carey Miller. Yeah.

1 I'm not entirely sure what the, I guess, objection there is.

2 But frankly, Your Honor, as far as a FOIA request
3 under Michigan law, we're entitled to that information, the
4 kind that is incumbent upon the University of Michigan to
5 provide. I would presume that the University of Michigan will
6 be mindful of any Michigan statutory limitations as far as what
7 is subject to public records.

8 But respectfully, Your Honor, this is a bit beyond
9 the scope of the Court in this posture.

10 THE COURT: Well, the thing is --

11 MR. CROSS: Your Honor --

12 THE COURT: -- the plaintiffs have very actively used
13 the Open Records Act for its case -- for building their cases
14 both for preliminary injunction hearings and otherwise.

15 I mean, there is a different point that you have
16 made, Mr. Cross, that he -- that Dr. Halderman may not, in
17 fact, have relied upon some of the documents that are being
18 secured under the Open Records Act. But he can obviously state
19 that expressly, that that was not -- I didn't think it was
20 relevant and that is not what I -- and I was not relying on
21 this.

22 I don't -- I don't really -- you know, maybe there is
23 a different concern that it puts a burden on the University and
24 he doesn't want to be in that position that his -- that his
25 consulting and work here has put any type of burden on the

1 University. I don't know what it is.

2 But -- and I can understand that personally. But I'm
3 not sure it is -- unless y'all had some agreement that I'm not
4 aware of -- and maybe you do -- I don't understand what is
5 being -- why they wouldn't be able to use an Open Records Act
6 request.

7 MR. CROSS: Yes, Your Honor. This is David Cross.
8 It may be it just depends on what it captures. We just learned
9 about it today.

10 I have had experts in many, many cases over the years
11 that work with universities. I have never had anyone FOIA
12 their university. And what we just want to make sure is that
13 this is not an end run around the limits on discovery.

14 For example, if there were drafts of reports that
15 were sitting on a university server, I don't see why they would
16 get that under a FOIA request when they are not entitled to it
17 under the rules in this case. That would be an end run around
18 that protection that is built in to the Federal Rules of the
19 litigant in the case.

20 THE COURT: Well, it doesn't mean that I would admit
21 it. I mean, that is something different if it is a draft. And
22 it doesn't mean I would admit it.

23 But there are -- it is -- definitely you were facing
24 yourselves a lot of roadblocks imposed by the State on
25 discovery and just ended up using FOIA in order to deal with

1 that. And, of course, it is the State Open Records Act.

2 So I'm not saying it is admissible. That is
3 something completely different. But I'm not in a position to
4 basically tell them that they can't use FOIA, just as I won't
5 tell you that you can't use the State Open Records Act.

6 MR. CROSS: Understood, Your Honor. I would just say
7 the difference is when we submit Open Records Act we're sending
8 it to the State. Right? So the State's counsel -- in fact, I
9 think the State counsel has asked us to keep him informed of
10 that. And at least for us, I think we have done that on every
11 occasion. My group has not done many Open Records requests.

12 But in any event, they are in a position to control
13 what comes out. Not surprisingly, we haven't gotten a lot of
14 response to those requests.

15 Here, it is third party. I don't know that I have
16 any ability to protect my client's privilege. And that is the
17 issue. Right? My client's expert -- the privilege belongs to
18 my client.

19 And so to serve a FOIA request that feels like an end
20 run around that is the concern. Again, we can see how it plays
21 out.

22 I suppose we can do the same thing for Dr. Gilbert
23 that we serve through the public university in Florida.

24 THE COURT: Yes.

25 MR. CROSS: I have just never seen it before. It

1 seems like an odd way to go about it. But I supposed we could
2 -- both sides could --

3 THE COURT: I would suggest that you-all talk about
4 it because it could be kind of ugly for both professors.

5 MR. CROSS: Right.

6 THE COURT: So I mean, having some understanding
7 would be appropriate. I mean, otherwise, you are basically
8 having both professors having to deal with their university,
9 which is not a lot of fun.

10 But -- so, you know, if you had an agreed
11 understanding, I'm sure the University would be happy not to be
12 looking for rough drafts, whether it be the University of
13 Michigan or Florida.

14 MR. CROSS: Right. Okay. Thank you, Your Honor.

15 THE COURT: All right.

16 MR. CROSS: The last thing is I think maybe the
17 easiest. There has been some discussion about privilege logs.
18 And I think we were all just trying to figure out a date.

19 I figured while we were all here whether we could
20 agree that the privilege logs would be exchanged one week from
21 today, if that is a date that works for everyone.

22 THE COURT: Mr. Russo, Mr. Miller?

23 MR. MILLER: Your Honor, this is Carey Miller. You
24 know, we'll produce a privilege log immediately when we are
25 done with the kind of quality control process. Maybe two weeks

1 from today, if that would be acceptable, or two weeks from
2 tomorrow.

3 Frankly, Your Honor, our last discussion I believe I
4 got from another counsel of record of Mr. Cross' firm indicated
5 that plaintiffs didn't intend to produce a privilege log. As
6 long as we're exchanging them, that is fine.

7 THE COURT: Is two weeks satisfactory, Mr. Brown and
8 Mr. Cross?

9 MR. CROSS: Sure. Yes, Your Honor. This is David
10 Cross.

11 THE COURT: All right. Friday -- two weeks from --
12 essentially two weeks from now, plus the day of Friday. Very
13 good. But I'm expecting them to be filed on or exchanged on
14 the Friday. I don't need to have them filed with me.

15 MR. CROSS: Thank you, Your Honor.

16 THE COURT: All right. Very good. Thanks very much.
17 Is there anything else from any other counsel before
18 we conclude?

19 MR. RUSSO: No, Your Honor, not for State defendants.
20 This is Vincent Russo.

21 MR. BROWN: This is Bruce Brown. Not for the
22 Coalition plaintiffs, Your Honor.

23 THE COURT: All right. Thank you.

24 All right. That concludes this proceeding. Bye-bye.

25 **(The proceedings were thereby concluded at 4:51**

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C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 32 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 7th day of October, 2021.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
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